A

Cheah Ai Tee v Khor Chiew Khee

B HIGH COURT (ALOR SETAR) — DIVORCE PETITION NO 33NCVC-02–01 OF 2012
CHAN JIT LI JC
7 JUNE 2017

C *Family Law — Children — Decree nisi granted — Application to vary terms of decree nisi and judgment — Whether respondent husband should be allowed to cease payment of monthly allowance for both children — Whether payment of monthly maintenance of wife should be reduced — Whether contribution capital validly claimed*

D

The petitioner wife in seeking a divorce had instituted the instant petition. At the conclusion of the hearing of the petition, the High Court on 23 January 2013 delivered the judgments. The respondent husband did not appeal against the 2013 judgment. Instead, the respondent chose to file the present application as in encl 80 on 31 January 2016 seeking to vary the terms of the 2013 judgment. The respondent husband sought: (a) to have a right of custody and control of the children and cease the monthly allowance of RM2,000 for the children; (b) to vary the payment of monthly allowance to the petitioner wife; and (c) to deny the claim of capital contribution and proceeds of sale of a premise by the petitioner wife.

E

F

Held, allowing the respondent's application in part with no order for costs:

(1) There was no dispute that the children were now with the respondent husband. It was satisfied that, after interviewing the child, the child was capable, able and had on his own violation chose to live with his father. The respondent husband should be allowed to cease payment of the monthly allowance of RM2,000 for both the children with effect from the date that the children commenced residence with him (see paras 4–5).

G

H

(2) The court was satisfied from the documentary evidence produced that while their daughter was not in 2013 pursuing an oversea education, she was now. The respondent husband had shown that in respect of the daughter's education he had to shoulder additional financial obligation. As such, the court allowed a reduction of the monthly maintenance payable to the petitioner wife from RM3,000 to RM2,000 (see para 12).

I

(3) In relation to (c), based on the 2013 judgment, the award given was not for maintenance, but a repayment of monies advanced by the petitioner

wife for the business of 'Perniagaan Tayar dan Bateri Ban Chiew' and the purchase of a premise known as No 7B, Taman Mewah Jaya, Batu 3, Tandop 06650 Alor Setar, Kedah. This was a repayment of a loan; a debt, as such, the present variation could not be allowed (see para 15).

[Bahasa Malaysia summary

Pempetisyen telah memulakan petisyen semasa dalam permohonan penceraian. Setelah mendengar pendengaran petisyen tersebut, Mahkamah Tinggi telah membuat keputusan pada 23 Januari 2013. Responden tidak membuat rayuan terhadap keputusan Mahkamah Tinggi tersebut. Sebaliknya, responden memilih untuk memfailkan permohonan semasa seperti mana di dalam Lampiran 80 pada 31 Januari 2016 memohon untuk mengubah terma dalam penghakiman yang diputuskan tersebut. Dalam permohonan semasa, responden memohon: (a) hak jagaan dan kawalan anak-anak dan menghentikan pembayaran elaun bulanan untuk anak-anak sebanyak RM2,000; (b) mengubah jumlah bayaran elaun bulanan kepada pempetisyen; dan (c) untuk menghalang tuntutan modal sumbangan and hasil jualan premis oleh pempetisyen.

Diputuskan, membenarkan sebahagian permohonan responden tanpa kos:

(1) Tiada pertikaian bahawa anak-anak sekarang tinggal bersama responden. Mahkamah berpuas hati, setelah menemu bual anak-anak tersebut, anak-anak berkeupayaan dan mampu untuk memilih tinggal bersama-sama dengan ayah mereka. Responden dibenarkan untuk hentikan pembayaran elaun bulanan sebanyak RM2,000 untuk kedua-dua anak bermula pada tempoh anak-anak tinggal bersama-sama responden (lihat perenggan 4–5).

(2) Mahkamah berpuas hati berdasarkan keterangan dokumentari yang diberikan, anak perempuan pempetisyen dan responden sekarang sedang mengikuti pengajian di luar negara. Pada tahun 2013, anak perempuan tersebut tidak mengikuti pengajian di luar negara. Responden telah membuktikan responden menanggung beban perbelanjaan yang lebih bagi menampung kos pengajian anak perempuan tersebut. Disebabkan itu, mahkamah membenarkan bayaran bulanan kepada pempetisyen dikurangkan daripada RM3,000 kepada RM2,0000 (lihat perenggan 12).

(3) Berkaitan dengan permohonan dalam perenggan (c), berdasarkan penghakiman yang dibuat pada 2013, ganjaran yang diberikan adalah bukan untuk penyelenggaraan, tetapi untuk bayaran semula wang yang telah didahulukan oleh pempetisyen untuk urusan perniagaan di 'Peniagaan Tayar dan Bateri Ban Chiew' dan pembelian premis perumahan beralamat di No 7B, Taman Mewah Jaya, Batu 3, Tandop 06650 Alor Setar, Kedah. Ini merupakan bayaran semula satu pinjaman

A atau hutang, oleh itu, permohonan untuk mengubah terma bayaran adalah tidak dibenarkan (lihat perenggan 15).]

Notes

B For cases on children in general, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3740–3829.

Siti Hanida bt Abdul Kadir (Kedah Legal Aid Department) for the petitioner.
Loo Yook Khin (YK Loo & Co) for the respondent.

C **Chan Jit Li JC:**

[1] The petitioner wife in seeking a divorce had instituted the instant petition. At the conclusion of the hearing of the petition, the High Court on 23 January 2013 delivered the following judgment ('the 2013 judgment'):

D *DALAM MAHKAMAH TINGGI MALAYA DI ALOR SETAR*

PETISYEN PERCERAIAN NO: 33NCVC-02-01/2012

Dalam Perkara Seksyen 53, 54, Akta Membaharui Undang —

E Undang (Perkahwinan dan Penceraian) 1976

ANTARA

CHEAH AI TEE (NO K/P: 610212-02-5778) (PEMPETISYEN)

F *DAN*

KHOR CHIEW KHEE (NO K/P: 580508-02-5465) (RESPONDEN)

PERINTAH

G *SETELAH PENGISYTIHARAAN DEKRINISI* pada hari ini dan dengan kehadiran Ang Khoon Cheong, Peguamcara Pempetisyen dan Y.K. Loo, Peguamcara Responden dengan kehadiran Pempetisyen *CHEAH AI TEE* dan Responden *KHOR CHIEW KHEE*.

MAKA ADALAH DIPERINTAHKAN :-

H (a) Perkahwinan ini dibubarkan;

(b) Hak jagaan dan kawalan *KHOR CHAO CHELT* dan *KHOR CHAO EN* diberi kepada Pempetisyen dan Responden diberi hak akses yang munasabah untuk melihat kedua-dua anaknya.

I (c) bahawa pembayaran nafkah bulanan sebanyak RM2,000.00 sebulan untuk setiap anak dibayar kepada KHOR CHAO CHELT dan CHAO EN di bawah jagaan Pempetisyen;

(d) Bahawa Responden hendaklah membayar Pempetisyen wang sebanyak RM3,000.00 setiap bulan.

(e) Bahawa Responden hendaklah menyerahkan milikan kosong premis yang dikenali sebagai No. 64, Taman Keranji, Jalan Alor Mengkudu, 05400 Alor Setar, Kedah Darul Aman kepada Pempetisyen.

(f) Bahawa Responden hendaklah membayar kepada Pempetisyen wang berjumlah RM105,000.00 sebagai sumbangan modal Pempetisyen kepada Ban Chiew dan pembayaran sebahagian daripada pempelian premis yang beralamat di No. 7B, Taman Mewah Jaya, Batu 3, Tandop, 06650 Alor Setar, Kedah Darul Aman.

(g) Kos perceraian ditanggung oleh Pempetisyen dan Responden, masing-masing.

Jika Kamu, *KHOR CHIEW KHEE*, Responden yang dinamakan di atas dalam ini, abai mematuhi Perintah ini mengikut syarat yang dihadkan dalamnya itu, kamu boleh dikenakan proses perlaksanaan bagi maksud memaska kamu mematuhinya.

Bertarikh *21 MAC, 2013*

t.t

PENOLONG KANAN PENDAFTAR,

MAHKAMAH TINGGI, ALOR SETAR,

KEDAH DARUL AMAN

[2] The respondent husband did not appeal against the 2013 judgment. Instead he has chosen to file the instant application (encl 80) on 31 January 2016 seeking to vary the terms of the 2013 judgment. Incidentally, there is a pending application by the petitioner wife for committal proceedings against the respondent husband for failing to comply in part with the 2013 judgment.

[3] Enclosure 80 appears as follows:

NOTIS PERMOHONAN

(Permohonan Responden untuk mengubah/meminda Dekri Nisi & Perintah

Mahkamah Tinggi bertarikh 21.3.2013)

BENARKAN SEMUA PIHAK yang berkenaan hadir di hadapan Hakim (atau Pendaftar) pada 23 haribulan Februari 2016, jam 9.00 pagi/petang mendengarkan permohonan oleh Responden di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 untuk perintah-perintah berikut:-

1. Bahawa Responden diberikan kebenaran untuk membuat permohonan ini bagi mengubah/meminda Dekri Nisi dan Perintah Mahkamah Tinggi Alor Setar bertarikh 21.3.2013;

2. Bahawa terma-terma Dekri Nisi dan Perintah Mahkamah Tinggi Alor Setar bertarikh 21.3.2013 tersebut diubah/dipinda seperti berikut :

   (i) Hak jagaan dan kawalan dua orang anak iaitu Khor Chao Chelt dan

Khor Chao En diberi kepada Responden dan Pempetisyen diberi hak akses yang munasabah untuk melihat kedua-dua anak tersebut;

(ii) Perintah pembayaran nafkah bulanan sebanyak RM2,000 sebulan oleh Responden kepada setiap orang anak beliau iaitu Khor Chao Chelt dan Khor Chao En dihentikan;

(iii) Perintah pembayaran nafkah bulanan sebanyak RM3,000.00 oleh Responden kepada Pempetisyen dihentikan ; dan

(iv) Responden tidak perlu membayar kepada Pempetisyen wang berjumlah RM105,000.00 sebagai sumbangan modal Pempetisyen kepada Perniagaan Tayar dan Bateri Ban Chiew dan pembayaran sebahagian daripada pembelian premis yang beralamat di No. 7B, Taman Mewah Jaya, Batu 3, Tandop 06650 Alor Setar, Kedah;

3. ...

(As these prayers are premised on different considerations, it will be more appropriate to consider them separately.)

Prayer 2(i) and (ii)

Hak jagaan dan kawalan dua orang anak iaitu Khor Chao Chelt dan Khor Chao En diberi kepada Responden dan Pempetisyen diberi hak akses yang munasabah untuk melihat kedua-dua anak tersebut.

Perintah pembayaran nafkah bulanan sebanyak RM2,000 sebulan oleh Responden kepada setiap orang anak beliau iaitu Khor Chao Chelt dan Khor Chao En dihentikan.

[4] I propose to deal with these two prayers together as they are intrinsically connected. In the initial order, the petitioner wife was given custody of both of the children while the respondent husband was given access rights. The respondent husband was also required to pay a monthly maintenance of RM2,000 for each of the child.

The elder son is now an adult while the younger child is still a minor. There is no dispute that both these children are now with the respondent husband. I directed that the minor child do appear before me. After interviewing the child I am satisfied that the child is capable, able and has on his own violation chosen to live with his father.

[5] In view of this, prayer (i) ie that the respondent husband have custody of the minor child and the petitioner wife be given reasonable access should be allowed. Accordingly, in respect of prayer (ii), the respondent husband should be allowed to cease payment of the monthly maintenance of RM2,000 for both the children with effect from the date that the children commence residence with him.

Prayer 2(iii)

> Perintah pembayaran nafkah bulanan sebanyak RM3,000.00 oleh Responden kepada Pempetisyen dihentikan.

[6] En Loo Yook Khin, learned counsel for the respondent husband, submits that this variation is premised on a material change in the respondent husband circumstances in that he is now in dire financial straits. From his averments contained in the affidavit in support of encl 80, the respondent husband states that his business is running at a loss. He is now required to support their daughter who is presently pursuing a law degree in the University of Sheffield, England. He is also required to maintain his aged father where at para 20 of the same affidavit he avers as follows:

> 20. Saya juga ingin menyatakan di sini bahawa saya kini sedang menjaga bapa saya yang tua berumur 88 tahun. Bapa saya tidak dapat bergerak(immobile) dan saya sendiri juga kini menampung segala perbelanjaan beliau berjumlah lebih kurang RM1,000 hingga RM3,000 sebulan.

[7] Apart from his own changed circumstances, there will also be a change in the circumstances of the petitioner wife. The respondent husband contends that with this favourable change of circumstances, the need for him to maintain her no longer arises. Apparently both of them are joint owners of a double storey shop office known as No 122, Kawasan Perusahaan Baru, Jalan Lencong Barat, 05050 Alor Setar, Kedah held in HS(D) 160/94, PT8811, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah Darul Aman. This property has now been sold for RM550,000 of which the respondent husband has received a sum of RM150,000 being the deposit payment. The petitioner wife is due to receive a lump sum payment of RM275,000 being payment for her half share of this property.

[8] In order to succeed on his application, it is incumbent on the respondent husband to show evidence of a material change of his circumstances as at 2013 when the judgment was given and as at 2016 when encl 80 was made. The contents of his averments can be broadly classified as a deterioration of his financial standing and a material increase in his financial obligations.

[9] As evidence of a deterioration of his financial standing, the respondent husband exhibited his tax returns for the years 2012–2014 only. It is very significant that he has failed to exhibit his tax returns for the years 2015 and 2016. He has not explained the non-production. Has he something to hide?

[10] I note from the documents made available to me that in 2012, his income was RM5,116 and that he suffered a loss of RM2,652 and he had a liability of RM606,831. In 2013, his income was RM5,876 and he suffered a

loss of RM19,311 and had a liability of RM653,492. His tax returns of 2014 showed his income to be RM8,537 and a loss of RM17,051 and a liability of RM751,031.

[11] The purported business low income, the business loss and liability was already in existence at the time the 2013 judgment was given. It is therefore my finding that the respondent husband has failed to show that there has been a material change in his financial standing.

[12] I now turn to the respondent husband's material increase in his financial obligations. This comprise of their daughter's education and his bedridden father which I interpret from the respondent husband term of 'imobilise'. I am satisfied from the documentary evidence produced that while their daughter was not in 2013 pursuing an overseas education, she is now. The respondent husband has shown that in respect of the daughter's education, he now has to shoulder additional financial obligation. As such I allow a reduction of the monthly maintenance payable to the petitioner wife from RM3,000 to RM2,000.

[13] In respect of the expenses he has to incur for his bedridden father, I find that the respondent husband has failed to produce any medical evidence, be it documentary or oral, to show that the father is bedridden. There is also no explanation for the alleged monthly expenses of RM1,000 to RM3,000. The cursory quote of a range between RM1,000 to RM3,000 impresses me as an amount that has been arbitrarily and wantonly given. As such, I find that his father's medical condition and the expenses required for the care of his father to be unproven. There is therefore no evidence of an increased financial obligation on the respondent husband in respect of this item.

[14] I would also like to add here that I find the respondent husband's contention of a favourable and material change in the petitioner wife's fortune as contained in para 7 to be without merits. Just as the petitioner wife's financial status will be improved with the sale of the joint property, so will his own financial status be improved by his own half share.

Prayer 2(iv)

> Responden tidak perlu membayar kepada Pempetisyen wang berjumlah RM105,000.00 sebagai sumbangan modal Pempetisyen kepada Perniagaan Tayar dan Bateri Ban Chiew dan pembayaran sebahagian daripada pembelian premis yang beralamat di No 7B, Taman Mewah Jaya, Batu 3, Tandop 06650 Alor Setar, Kedah.

[15] I am not appraised of the facts and evidence adduced at the trial in relation to this term. However, from a reading of the 2013 judgment, this is not

an award for maintenance but a repayment of monies advanced by the petitioner wife for the business of 'Perniagaan Tayar dan Bateri Ban Chiew' and the purchase of a premise known as No 7B, Taman Mewah Jaya, Batu 3, Tandop 06650 Alor Setar, Kedah. This is, to my mind, a repayment of a loan; a debt. In view of this, I am of the view that this variation cannot be allowed.

[16] To recap, after hearing the parties, I am allowing prayer 2(i), (ii) of encl 80. Prayer 2(iii) is allowed to the extent that the monthly maintenance to the petitioner wife is reduced to RM2,000. Prayer 2(iv) is dismissed. I make no order for costs as the petitioner wife is not seeking costs.

Respondent's application allowed in part with no order for costs.

Reported by Mohd Kamarul Anwar